

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CRYSTAL AUSTIN,)	
)	No. CV-07-0095-AMJ
Plaintiff,)	
)	REPORT AND RECOMMENDATION
v.)	TO GRANT DEFENDANT'S MOTION
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on September 17, 2007. (Ct. Rec. 18, 22). Plaintiff Crystal Austin ("Plaintiff") filed a reply brief on September 17, 2007. (Ct. Rec. 25). Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney David Burdett represents the Commissioner of Social Security ("Commissioner"). The parties have not filed a recent consent to proceed before a magistrate judge. (See, Ct. Rec. 16). After reviewing the administrative record and the briefs filed by the parties, the undersigned recommends **granting** Defendant's Motion for Summary Judgment (Ct. Rec. 22) and **denying** Plaintiff's Motion for Summary Judgment (Ct. Rec. 18).

JURISDICTION

On February 12, 2002, Plaintiff filed an application for Supplemental Security Income ("SSI") benefits. (Administrative Record ("AR") 77-80). Plaintiff's application for SSI was denied initially and on reconsideration. An administrative hearing was held before Administrative Law Judge ("ALJ") Richard Hines on November 19, 2003. (AR 433-485). On January 30, 2004, ALJ Hines issued a decision finding that Plaintiff was not disabled. (AR 241-248). However, on May 4, 2005, the Appeals Council granted Plaintiff's request for review and remanded the matter for additional proceedings. (AR 256-258).¹

On March 21, 2006, an administrative hearing was held before ALJ Mary B. Reed. (AR 486-536). On June 13, 2006, ALJ Reed issued a decision finding that Plaintiff was not disabled. (AR 18-32). On February 2, 2007, the Appeals Council denied Plaintiff's request for review. (AR 8-11). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on March 26, 2007. (Ct. Rec. 1).

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcripts, the ALJ's decisions, the briefs of both Plaintiff and the Commissioner and will only be summarized here. Plaintiff was

¹Plaintiff filed a later application for SSI on March 26, 2004. The application was denied initially and on reconsideration, and Plaintiff requested a hearing on this subsequent claim. In its May 4, 2005 order, the Appeals Council rendered the subsequent application to be a duplicate claim and ordered the claims to be associated. (AR 18, 258).

1 23 years old on the date of the ALJ's June 13, 2006 decision, has
2 a high school plus education and has past work experience as a
3 custodian, telemarketer, cashier, nursing assistant and care
4 giver. (AR 78, 96, 101). She alleges disability as of March 31,
5 2001, due to fibromyalgia, degenerative disk disease, herniated
6 disks, possible lupus, and severe pain. (AR 78, 95). Plaintiff
7 reported that she stopped working because her illnesses and
8 condition prevented her from continuing to perform her work
9 duties. (AR 95).

10 **STANDARD OF REVIEW**

11 _____Congress has provided a limited scope of judicial review of a
12 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
13 the Commissioner's decision, made through an ALJ, when the
14 determination is not based on legal error and is supported by
15 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
16 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
17 1999). "The [Commissioner's] determination that a plaintiff is
18 not disabled will be upheld if the findings of fact are supported
19 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
20 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
21 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
22 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
23 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
24 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
25 573, 576 (9th Cir. 1988). Substantial evidence "means such
26 evidence as a reasonable mind might accept as adequate to support
27 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
28 (citations omitted). "[S]uch inferences and conclusions as the

1 [Commissioner] may reasonably draw from the evidence" will also be
2 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
3 On review, the court considers the record as a whole, not just the
4 evidence supporting the decision of the Commissioner. *Weetman v.*
5 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
6 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

7 It is the role of the trier of fact, not this court, to
8 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
9 evidence supports more than one rational interpretation, the court
10 may not substitute its judgment for that of the Commissioner.
11 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
12 (9th Cir. 1984). Nevertheless, a decision supported by
13 substantial evidence will still be set aside if the proper legal
14 standards were not applied in weighing the evidence and making the
15 decision. *Browner v. Secretary of Health and Human Services*, 839
16 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
17 evidence to support the administrative findings, or if there is
18 conflicting evidence that will support a finding of either
19 disability or nondisability, the finding of the Commissioner is
20 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
21 1987).

22 SEQUENTIAL EVALUATION PROCESS

23 The Social Security Act (the "Act") defines "disability" as
24 the "inability to engage in any substantial gainful activity by
25 reason of any medically determinable physical or mental impairment
26 which can be expected to result in death or which has lasted or
27 can be expected to last for a continuous period of not less than
28 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The

1 Act also provides that a Plaintiff shall be determined to be under
2 a disability only if his impairments are of such severity that
3 Plaintiff is not only unable to do his previous work but cannot,
4 considering Plaintiff's age, education and work experiences,
5 engage in any other substantial gainful work which exists in the
6 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
7 Thus, the definition of disability consists of both medical and
8 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
9 (9th Cir. 2001).

10 The Commissioner has established a five-step sequential
11 evaluation process for determining whether a person is disabled.
12 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
13 engaged in substantial gainful activities. If he is, benefits are
14 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
15 decision maker proceeds to step two, which determines whether
16 Plaintiff has a medically severe impairment or combination of
17 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

18 If Plaintiff does not have a severe impairment or combination
19 of impairments, the disability claim is denied. If the impairment
20 is severe, the evaluation proceeds to the third step, which
21 compares Plaintiff's impairment with a number of listed
22 impairments acknowledged by the Commissioner to be so severe as to
23 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
24 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
25 meets or equals one of the listed impairments, Plaintiff is
26 conclusively presumed to be disabled. If the impairment is not
27 one conclusively presumed to be disabling, the evaluation proceeds
28 to the fourth step, which determines whether the impairment

1 prevents Plaintiff from performing work he has performed in the
2 past. If Plaintiff is able to perform his previous work, he is
3 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
4 cannot perform this work, the fifth and final step in the process
5 determines whether Plaintiff is able to perform other work in the
6 national economy in view of his residual functional capacity and
7 his age, education and past work experience. 20 C.F.R. §§
8 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

9 The initial burden of proof rests upon Plaintiff to establish
10 a *prima facie* case of entitlement to disability benefits.
11 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
12 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
13 met once Plaintiff establishes that a physical or mental
14 impairment prevents him from engaging in his previous occupation.
15 The burden then shifts to the Commissioner to show (1) that
16 Plaintiff can perform other substantial gainful activity and (2)
17 that a "significant number of jobs exist in the national economy"
18 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
19 (9th Cir. 1984).

20 ALJ'S FINDINGS

21 The ALJ found at step one that Plaintiff has not engaged in
22 substantial gainful activity since her alleged onset date. (AR
23 20-21). At step two, the ALJ determined that Plaintiff has
24 degenerative disk disease of the lumbar spine, degenerative disk
25 disease of the cervical spine and obesity, severe impairments, but
26 that she does not have an impairment or combination of impairments
27 which meet or equal a Listings impairment. (AR 21-24).

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1 The ALJ found that Plaintiff has the residual functional
2 capacity ("RFC") to perform a range of light exertion level work.
3 (AR 24-30). She specifically determined that Plaintiff could
4 lift/carry and push/pull up to 20 pounds occasionally and 10
5 pounds frequently; sit, stand and walk, with normal breaks, six
6 hours out of an eight hour day; climb ramps and stairs
7 occasionally; avoid ropes, ladders and scaffolding; balance
8 frequently; kneel, stoop and crouch occasionally; avoid crawling;
9 reach overhead occasionally; avoid activities requiring the neck
10 to be extended backward; and avoid extreme cold, humidity, wetness
11 and unprotected heights. (AR 30).

12 At step four of the sequential evaluation process, the ALJ
13 determined that Plaintiff has no past relevant work. (AR 30-31).
14 At step five, based on the testimony of the vocational expert and
15 considering Plaintiff's age, educational background, work
16 experience and RFC, the ALJ concluded that Plaintiff could perform
17 work as an assembly worker, production inspector and checker, and
18 hand packer, jobs that exist in significant numbers in the
19 national economy. (AR 31-32). Accordingly, the ALJ determined at
20 step five of the sequential evaluation process that Plaintiff was
21 not disabled within the meaning of the Social Security Act. (AR
22 31-32).

23 ISSUES

24 Plaintiff contends that the Commissioner erred as a matter of
25 law. She specifically argues that:

26 1. The ALJ erred by rejecting the opinions of Plaintiff's
27 treating physician, Eric Sohn, M.D.;

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1 2. The ALJ failed to provide proper rationale for rejecting
2 Plaintiff's symptom testimony; and

3 3. The ALJ erred by not providing germane reasons for
4 rejecting the lay witness testimony of Plaintiff's mother, Teresa
5 Scott.

6 This court must uphold the Commissioner's determination that
7 Plaintiff is not disabled if the Commissioner applied the proper
8 legal standards and there is substantial evidence in the record as
9 a whole to support the decision.

10 DISCUSSION

11 **A. Plaintiff's Credibility**

12 Plaintiff argues that the ALJ failed to provide specific,
13 clear and convincing reasons why her testimony regarding pain and
14 numbness in her extremities was rejected. (Ct. Rec. 19 at 16-18).
15 The Commissioner contends that the ALJ properly found that
16 Plaintiff's allegations concerning her impairments and their
17 impact on her ability to sustain work-related activity were not
18 entirely credible. (Ct. Rec. 23 at 7-13). The Commissioner
19 asserts that the ALJ provided ample reasons that were sufficiently
20 specific to show that she did not arbitrarily discredit
21 Plaintiff's testimony. (*Id.*)

22 It is the province of the ALJ to make credibility
23 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
24 1995). However, the ALJ's findings must be supported by specific
25 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
26 1990). Once Plaintiff produces medical evidence of an underlying
27 impairment, the ALJ may not discredit Plaintiff's testimony as to
28 the severity of an impairment because it is unsupported by medical

1 evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)
2 (citation omitted). Absent affirmative evidence of malingering,
3 the ALJ's reasons for rejecting Plaintiff's testimony must be
4 "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th
5 Cir. 1995). "General findings are insufficient: rather the ALJ
6 must identify what testimony is not credible and what evidence
7 undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
8 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). The ALJ may
9 consider at least the following factors when weighing Plaintiff's
10 credibility: Plaintiff's reputation for truthfulness,
11 inconsistencies either in her testimony or between her testimony
12 and her conduct, Plaintiff's daily activities, Plaintiff's work
13 record, and testimony from physicians and third parties concerning
14 the nature, severity, and effect of the symptoms of which she
15 complains. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
16 2002). If the ALJ's credibility finding is supported by
17 substantial evidence in the record, the court may not engage in
18 second-guessing. *Id.* at 959.

19 The ALJ considered the evidence of record and concluded that
20 Plaintiff's medically determinable impairments could reasonably be
21 expected to produce the alleged symptoms, but that Plaintiff's
22 statements concerning the intensity, duration and limiting effects
23 of these symptoms were not entirely credible. (AR 25). The ALJ
24 discussed the evidence relating to Plaintiff's subjective
25 complaints (AR 25-28) and determined that Plaintiff's testimony
26 was not fully credible and her statements concerning her pain,
27 symptoms and limitations were not persuasive (AR 28).

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1 The ALJ noted several inconsistencies in Plaintiff's
2 testimony. (AR 25-28). Inconsistencies in a disability
3 claimant's testimony supports a decision by an ALJ that a claimant
4 lacks credibility with respect to her claim of disabling pain.
5 *Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir. 1986). The ALJ
6 indicated that at Plaintiff's administrative hearing on November
7 19, 2003, Plaintiff testified that she used a walker to assist
8 with her walking due to leg pain and numbness, needed assistance
9 with bathing and using the bathroom, did not drive due to neck
10 pain and numbness in her hands and arms, could only walk one to
11 two blocks and could not get out of bed three days a week due to
12 pain. (AR 25, 457-475). However, at the administrative hearing
13 held on March 21, 2006, there was no mention of the use of a
14 walker, no mention of assistance needed for personal care,
15 Plaintiff testified she would walk a mile and that her inability
16 to get out of bed was limited to one to two times per month and
17 Plaintiff stated she rarely drove due to numbness and shooting
18 pain in her legs, but mentioned nothing about her neck or arms.
19 (AR 25, 506-526). In addition, the ALJ noted that there is no
20 mention in her medical records of the use or recommended use of a
21 walker to assist with ambulation. (AR 25).

22 Plaintiff was examined by Fred Price, D.O., on June 26, 2004.
23 (AR 377-385). As noted by the ALJ, Plaintiff "painted a picture
24 of almost complete inability to perform any activities of daily
25 living to Dr. Price in June 2004 and yet one month prior she told
26 Dr. Sohn her activities of daily living were easier with narcotic
27 pain medication." (AR 27, 361). Plaintiff related to Dr. Price
28 that her back, neck, feet, hands, arms and joints in general are

1 "continuously aching, shooting, tender, exhausting, and tiring,
2 miserable, and unbearable." (AR 378). Plaintiff reported
3 "extreme inability to do most activities, including get out of
4 bed . . . because of extreme subjective pain and discomfort." (AR
5 379). However, Dr. Price found no active acute or ongoing disease
6 processes to explain Plaintiff's subjective pain, and concluded
7 there was no reason why Plaintiff would not be able to perform
8 medium work activity. (AR 384).

9 The ALJ indicated that the record did not show Plaintiff had
10 made any specific complaints to her treating health care
11 professionals as she described to Dr. Price; namely, pain
12 radiating down her arms resulting in difficulty in lifting,
13 grabbing, manipulating, doing housework and awkward balance with
14 difficulty standing on her right leg. (AR 27). The ALJ noted
15 that, in contrast, Plaintiff testified at the March 2006
16 administrative hearing that she spent at least 40 minutes a day
17 drawing and one hour a day crocheting. (AR 27 n. 4, 523). The
18 ALJ indicating that these activities involve extensive use of the
19 fingers and hands, including grasping and manipulating, and such
20 activities contradict her alleged arm, hand and finger complaints.
21 (AR 27 n. 4). The ALJ further noted that in January of 2003,
22 Plaintiff's subjective complaints consisted of neck pain radiating
23 into her arms with the left arm worse than the right arm. (AR 26,
24 212). However, this statement is inconsistent with Plaintiff's
25 testimony at the administrative hearing in March of 2006 that her
26 right arm symptoms are more intense and frequent. (AR 26, 510).

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1 The ALJ also noted that while Plaintiff has described her
2 cervical, lumbar and right leg pain as constant and a loss of
3 balance, Dr. John J. Demakas' April 28, 2005 examination findings
4 did not support these complaints. (AR 25-26, 416-420). Dr.
5 Demakas noted Plaintiff's gait and station were normal, she was
6 able to toe and heel walk, do toe raises and knee bends and tandem
7 walk without difficulty, and, while lumbar and cervical flexion,
8 extension, lateral bending and rotation were noted as limited
9 secondary to pain, all other musculoskeletal tests were found to
10 be negative and neurological findings were normal. (AR 418). Dr.
11 Demakas indicated that Plaintiff's symptoms were in no specific
12 dermatomal pattern, making it difficult to tell where the pain may
13 be emanating, and noted that Plaintiff had a 5/5 Waddell² in
14 regard to her lumbar spine. (AR 419).

15 The ALJ further discussed the effectiveness of medication in
16 alleviating Plaintiff's symptoms. The effectiveness of medication
17 in alleviating pain and other symptoms is a relevant factor to
18 consider in evaluating the severity of a claimant's symptoms. 20
19 C.F.R. § 416.929(c)(3). The ALJ noted that Plaintiff's medical
20 evaluation in June of 2003 indicated full range of motion in the
21 spine and good relief taking six Oxycodone per day. (AR 26, 224).
22 In November of 2003, Plaintiff reported her pain level went from
23 an 8/10 (with 10 being the worst pain) to a 2/10 while taking
24 Demerol and Soma, her daily activities were easier and she was
25 happier and more active. (AR 26-27, 359). In May of 2004,
26 Plaintiff continued to report her activities of daily living were
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28 ²The ALJ indicated that a positive (5/5) Waddell's test is
historically suggestive of malingering. (AR 28).

1 easier while taking medication (AR 361), contrary to her
2 complaints to Dr. Price one month later (AR 377-385). The ALJ
3 noted that, by October 2005, Plaintiff again reported that her
4 activities of daily living were "OK" and that her pain levels were
5 2/10 with her medication and 9/10 without her medication. (AR 27,
6 409). The ALJ determined that since the record did not reflect
7 that Plaintiff's medications produced any debilitating side
8 effects and the medications were shown to reduce Plaintiff's pain
9 level to a more than tolerable level, it could be concluded that
10 any pain Plaintiff is experiencing on a daily basis is well
11 controlled with medication and should only have a minimal effect
12 on her ability to perform work activities. (AR 27).

13 The ALJ also referenced the timing of Plaintiff's visits to
14 her primary care physician, Dr. Sohn, as evidence of motivation
15 for secondary gain. (AR 26). The Ninth Circuit has recognized
16 that the ALJ may properly consider the issue of motivation in
17 assessing credibility. *Matney v. Sullivan*, 981 F.2d 1016, 1020
18 (9th Cir. 1992). The ALJ observed that Plaintiff's subjective
19 complaints of disabling pain and visits to Dr. Sohn would increase
20 when state disability welfare forms needed to be completed. (AR
21 26). Once the forms were completed, Plaintiff would not return to
22 Dr. Sohn for several months. (AR 26).

23 The ALJ determined that Plaintiff's testimony was not fully
24 credible and her statements concerning her pain, symptoms and
25 limitations were not persuasive. (AR 28). The ALJ is responsible
26 for reviewing the evidence and resolving conflicts or ambiguities
27 in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
28 1989). It is the role of the trier of fact, not this court, to

1 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. The
2 court has a limited role in determining whether the ALJ's decision
3 is supported by substantial evidence and may not substitute its
4 own judgment for that of the ALJ even if it might justifiably have
5 reached a different result upon de novo review. 42 U.S.C. §
6 405(g). After reviewing the record, the undersigned finds that
7 the reasons provided by the ALJ for finding Plaintiff not fully
8 credible, as outlined above, are clear and convincing and
9 supported by substantial evidence in the record. Accordingly, the
10 ALJ did not err by concluding that Plaintiff's statements
11 concerning her pain, symptoms and limitations were not persuasive.
12 (AR 28).

13 **B. Lay Witness Credibility**

14 Plaintiff further contends that the ALJ erred by not making
15 proper credibility findings as to the testimony of Plaintiff's
16 mother, Teresa Scott. (Ct. Rec. 19 at 18-19). The ALJ may not
17 ignore or improperly reject the probative testimony of a lay
18 witness without giving reasons that are germane to each witness.
19 *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). The ALJ
20 shall "consider observations by non-medical sources as to how an
21 impairment affects a claimant's ability to work." *Sprague v.*
22 *Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) *citing* 20 C.F.R. §
23 404.1513(e) (2).

24 The ALJ discussed the March 20, 2006 letter submitted by Mrs.
25 Scott. (AR 25, 340). The ALJ indicated that Mrs. Scott stated
26 she would help her daughter, most of the time, by preparing her
27 meals and doing her laundry unless Plaintiff was having a "good
28 day." (AR 25, 340). The ALJ indicated Mrs. Scott's letter

1 further reported that Plaintiff's husband has had to take time off
2 from work to assist Plaintiff when Mrs. Scott was not available
3 and that Plaintiff could not plan on doing much because she could
4 never tell how she would be on any given day. (AR 25, 340). Mrs.
5 Scott's letter stated that Plaintiff had to take one day at a
6 time. (AR 25, 340).

7 The ALJ concluded that Mrs. Scott's testimony was based on
8 Plaintiff's self-report of limitations which appeared to be
9 motivated toward secondary gain and to get help from her mother.
10 (AR 28). The ALJ indicated that, since she found Plaintiff's
11 self-reports of limitations to be not credible, the statements
12 regarding limitations found in the letter from Plaintiff's mother
13 were not given weight. (AR 28).

14 It is significant to note that Mrs. Scott's letter is not
15 consistent with the credible evidence of record. While Mrs. Scott
16 references Plaintiff's fibromyalgia as a major limiting impairment
17 for Plaintiff, the weight of the credible evidence of record
18 reflects that Plaintiff does not have fibromyalgia. (AR 23).
19 Moreover, as more fully discussed in Section C, below, the medical
20 evidence of record does not support greater physical limitations
21 than those found by the ALJ in this case. *See, infra*. In any
22 event, the ALJ clearly considered the lay witness testimony (AR
23 25, 28) and appropriately found it lacking in credibility because
24 it appeared to be based on Plaintiff's non-credible subjective
25 complaints (AR 28). The ALJ properly rejected the testimony of
26 Plaintiff's mother by providing germane reasons.

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1 **C. Physical Limitations**

2 Plaintiff argues that she is more limited from a physical
3 standpoint than as determined by the ALJ in this case. (Ct. Rec.
4 19 at 12-16). Plaintiff specifically asserts that the ALJ failed
5 to provide specific and legitimate reasons for rejecting the
6 medical opinions of her treating physician, Eric Sohn, M.D. (Ct.
7 Rec. 19 at 12-16). The Commissioner responds that the ALJ
8 properly evaluated the medical evidence of record and provided
9 appropriate rationale for rejecting Dr. Sohn's opinions contained
10 in his November 18, 2003 report. (Ct. Rec. 23 at 13-20).

11 The courts distinguish among the opinions of three types of
12 physicians: treating physicians, physicians who examine but do
13 not treat the claimant (examining physicians) and those who
14 neither examine nor treat the claimant (nonexamining physicians).
15 *Lester v. Chater*, 81 F.3d 821, 839 (9th Cir. 1996). A treating
16 physician's opinion is given special weight because of familiarity
17 with the claimant. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
18 1989). Thus, more weight is generally given to a treating
19 physician than an examining physician. *Lester*, 81 F.3d at 830.
20 However, the treating physician's opinion is not "necessarily
21 conclusive as to either a physical condition or the ultimate issue
22 of disability." *Magallanes v. Bowen*, 881 F.2d 7474, 751 (9th Cir.
23 1989) (citations omitted).

24 The ALJ examined the evidence of record and determined that
25 Plaintiff has the physical capacity to perform a limited range of
26 light exertion level work. (AR 24-30). In making this RFC
27 finding, the ALJ specifically declined to give controlling weight
28 to the opinions expressed in Dr. Sohn's November 18, 2003 form

1 report (AR 234-237), finding that this report is unsupported by
2 objective evidence, is inconsistent with his own records, appears
3 to have been produced to assist Plaintiff with her disability
4 claim, and is inconsistent with other medical evidence of record.
5 (AR 28-29).

6 On November 18, 2003, Dr. Sohn filled out a Medical Source
7 Statement Of Ability To Do Work-Related Activities (Physical)
8 form. (AR 234-237).³ Dr. Sohn marked boxes indicating that
9 Plaintiff could only occasionally lift and/or carry less than 10
10 pounds, was not able to frequently lift and carry any weight, and
11 could stand and/or walk less than two hours in an eight-hour
12 workday. (AR 234). Dr. Sohn marked that Plaintiff was
13 additionally limited to pushing and pulling less than ten pounds
14 with her upper and lower extremities, could only occasionally
15 climb and balance, and could never kneel, crouch, crawl or stoop.
16 (AR 235). Finally, Dr. Sohn marked that, due to weakness in both
17 hands, Plaintiff could only occasionally reach, constantly feel
18 and never handle or finger. (AR 236).

19 As noted by the ALJ, this November 2003 report by Dr. Sohn
20 is not supported by his own chart notes. (AR 28). In a progress
21 note dated three days later, November 21, 2003, Plaintiff
22 reported to Dr. Sohn that her pain level was a 2/10 while taking
23 Demerol and Soma, her activities of daily living were easier, and
24 she was happier and more active. (AR 26-27, 358-359). In
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26 ³A check-box form is entitled to little weight. *Crane v.*
27 *Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (stating that the
28 ALJ's rejection of a check-off report that did not contain an
explanation of the bases for the conclusions made was
permissible).

1 addition, Plaintiff's medical evaluation in June of 2003
2 indicated full range of motion in the spine and good relief with
3 her medication (AR 224), and, in May of 2004, it was again
4 reported that Plaintiff's activities of daily living were easier
5 while taking medication (AR 361). On June 17, 2005, Plaintiff was
6 noted to be stable on medications and her activities of daily
7 living were easier. (AR 408). In October 2005, Plaintiff
8 reported that her activities of daily living were "OK" and that
9 her pain levels were 2/10 with her medication. (AR 409). Dr.
10 Sohn's chart notes do not support the severe limitations he
11 assessed in his November 2003 form report.

12 Furthermore, as indicated by the ALJ, Dr. Sohn's report is
13 inconsistent with the medical record as a whole. (AR 28). In
14 May of 2004, Plaintiff continued to report her activities of
15 daily living were easier while taking medication (AR 361),
16 contrary to her complaints to Dr. Price only one month later (AR
17 377-385). In June of 2004, although Plaintiff reported to Dr.
18 Price almost complete inability to perform activities of daily
19 living (AR 378-379), Dr. Price found no active acute or ongoing
20 disease processes to explain Plaintiff's subjective pain, and
21 concluded there was no reason why Plaintiff would not be able to
22 perform medium work activity (AR 384). State agency reviewing
23 physicians opined in July and September of 2004 that Plaintiff
24 could perform a full range of light exertion work. (AR 386-397).
25 Dr. Demakas' April 28, 2005 examination found Plaintiff's gait
26 and station were normal, she was able to toe and heel walk, do
27 toe raises and knee bends and tandem walk without difficulty,
28 and, while lumbar and cervical flexion, extension, lateral

1 bending and rotation were noted as limited secondary to pain, all
2 other musculoskeletal tests were found to be negative and
3 neurological findings were normal. (AR 418). Dr. Demakas
4 indicated that Plaintiff's symptoms were in no specific
5 dermatomal pattern, making it difficult to tell where the pain
6 may be emanating, and recommended that she "stay away from
7 surgery as long as possible." (AR 419). Again, in October 2005,
8 Plaintiff reported that her activities of daily living were "OK"
9 and that her pain levels were 2/10 with her medication. (AR
10 409).

11 Anne E. Winkler, M.D., Ph.D., testified as a medical expert
12 at the March 21, 2006 administrative hearing after reviewing the
13 complete record. (AR 491-505). Dr. Winkler testified that
14 Plaintiff would be able to lift and carry 20 pounds occasionally
15 and 10 pounds frequently, stand or walk six hours in an eight-hour
16 day, and sit at least six hours in an eight-hour day. (AR 496-
17 497). She stated that Plaintiff had no specific limits on pushing
18 and pulling with her extremities but would be limited to only
19 occasionally reaching overhead with no limits on handling,
20 fingering or feeling. (AR 497). Dr. Winkler opined that
21 Plaintiff could frequently balance, occasionally climb stairs or
22 ramps, kneel, stoop, and crouch, and never climb ladders, ropes or
23 scaffolds or crawl and would need to avoid extreme cold, humidity
24 and wetness and unprotected heights. (AR 497). While Dr. Sohn's
25 November check-box report concluded that Plaintiff was severely
26 limited, the weight of the record evidence is contrary to these
27 findings.

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1 The ALJ further noted a lack of any evidence of objective
2 testing for Plaintiff's complaints prior to Dr. Sohn filling out
3 the November form. (AR 29). Dr. Sohn's November 2003 form
4 report, as well as the chart notes preceding the November report,
5 fail to evidence objective testing for Plaintiff's complaints
6 regarding her physical abilities. Accordingly, it is reasonable
7 to conclude that Dr. Sohn's November 2003 report was based, at
8 least in part, on Plaintiff's self-reporting. *See, Tonapetyan v.*
9 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (a physician's
10 opinion may be disregarded when it is premised on the properly
11 rejected subjective complaints of Plaintiff). As indicated
12 above, the ALJ properly concluded that Plaintiff's statements
13 concerning her pain, symptoms and limitations were not
14 persuasive. *Supra*.

15 Finally, the ALJ also observed that Dr. Sohn's November
16 report appears to be merely an attempt to assist his patient with
17 her disability claim. (AR 28). When a physician is involved in
18 the application process, thus becoming an advocate for the
19 claimant, an ALJ is entitled to consider this factor in
20 evaluating his testimony. *Crane v. Shalala*, 76 F.3d 251, 254
21 (9th Cir. 1996). The ALJ noted that there was a dramatic increase
22 in Plaintiff's subjective complaints from December 2001 to May of
23 2002 when Plaintiff reported to Dr. Sohn to have a state
24 disability form completed. (AR 26). The ALJ observed that
25 Plaintiff's complaints of disabling pain and visits to Dr. Sohn
26 would increase when state disability welfare forms needed to be

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1 completed. (AR 26). Once the forms were completed, Plaintiff
2 would not return to Dr. Sohn for several months. (AR 26).

3 The weight of the evidence of record, as outlined above,
4 supports the ALJ's determination that Dr. Sohn's November 2003
5 report is entitled to no weight. (AR 28). The ALJ provided
6 appropriate rationale, specific and legitimate reasons, for
7 rejecting the November 2003 form report of Dr. Sohn (AR 234-237),
8 and the ALJ's RFC determination is in accord with the weight of
9 the record evidence and free of error.

10 CONCLUSION

11 Having reviewed the record and the ALJ's conclusions, this
12 court finds that the ALJ's decision is supported by substantial
13 evidence and free of legal error. Plaintiff thus is not disabled
14 within the meaning of the Social Security Act. Accordingly, **IT**
15 **IS RECOMMENDED:**

16 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 18**)
17 be **DENIED**.

18 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 22**)
19 be **GRANTED**.

20 The District Court Executive is directed to enter this
21 Report and Recommendation and provide a copy to counsel and to
22 the referring judge.

23 **OBJECTIONS**

24 Any party may object to a magistrate judge's proposed
25 findings, recommendations or report within ten (10) days
26 following service with a copy thereof. Such party shall file
27 with the District Court Executive all written objections,
28 specifically identifying the portions to which objection is being

1 made, and the basis therefor. Attention is directed to Fed. R.
2 Civ. P. 6(e), which adds another three (3) days from the date of
3 mailing if service is by mail.

4 A district judge will make a *de novo* determination of those
5 portions to which objection is made and may accept, reject, or
6 modify the magistrate judge's determination. The district judge
7 need not conduct a new hearing or hear arguments and may consider
8 the magistrate judge's record and make an independent
9 determination thereon. The district judge may also receive
10 further evidence or recommit the matter to the magistrate judge
11 with instructions. See 28 U.S.C. § 636(b)(1)(B) and (C), Fed. R.
12 Civ. P. 73, and LMR 4, Local Rules for the Eastern District of
13 Washington. The magistrate judge's recommendation cannot be
14 appealed to the Ninth Circuit Court of Appeals; only a district
15 judge's final order or judgment can be appealed.

16 **DATED** this 14th day of December, 2007.

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18 S/Cynthia Imbrogno
19 CYNTHIA IMBROGNO
20 UNITED STATES MAGISTRATE JUDGE
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